10124–10170 SETTLEMENTS

10124–10142 SETTLEMENTS/NON-BOARD ADJUSTMENTS

10124 Settlements/Non-Board Adjustments

Unfair labor practice cases may be resolved through informal or formal Board settlement agreements or through non-Board adjustments. Board settlement agreements carry with them the Agency's imprimatur and compliance with them is policed by the Agency. Non-Board adjustments are agreements between the parties that result in the withdrawal of the charge.

10124.1 Policy

It is the policy of the Board and the General Counsel to actively encourage the parties to reach a mutually satisfactory resolution of issues at the earliest possible stage. Moreover, the Administrative Procedure Act (Sec. 5(b)) requires that the Agency consider "offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit." (5 U.S.C. § 554(c)(1)). Since voluntary remedial action is a high priority, diligent settlement efforts should be exerted in all meritorious cases. Settlement of a meritorious case is the most effective means to: (1) improve relationships between the parties; (2) effectuate the purposes of the Act; and (3) permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses.

10124.2 Principal Factor in Achieving Settlement

The principal factor affecting a Regional Office's success in achieving settlement is the confidence of the public in the ability, impartiality and integrity of the Regional Office. When the public is satisfied that the Regional Office, when proposing or negotiating settlement, has fully investigated and considered the facts of the case and is convinced that the formal prosecution of the case would result in the finding of unfair labor practices, the chances of settlement are considerably increased.

10124.3 Scope of Remedy

Public confidence is also nurtured by the history of the nature and extent of the settlements sought and obtained by the Regional Office. The Regional Office should seek a settlement agreement which substantially remedies all unfair labor practices deemed meritorious. The proposed remedy, however, must not exceed that which would be expected from a fully favorable Board decision. Moreover, practical considerations, such as the quality of the evidence regarding certain allegations or the desires of the charging party, may result in the approval of a settlement agreement with a lesser remedy if it will effectuate the policies of the Act to do so.

Although settlement of a charge is limited to securing compliance with the Act, the parties should be encouraged to resolve other collateral disputes as well if it would

assist in settling the case before the agency. In this regard, it should be noted that the unfair labor practice charge might be only one element of a broader dispute between the parties.

10124.4 Limitations on Regional Office Authority

In any case where the Regional Office is considering approval of a settlement agreement which is based on new or novel remedies, or where the notice posting is waived or is for less than 60 days, clearance should be sought from the Division of Advice. Regional Offices may also be directed to obtain clearance before approving settlement agreements in cases in which complaint has been authorized by Advice or the Office of Appeals.

10126 Timing of Settlement Attempts

10126.1 Prior to Regional Office Determination

Voluntary resolution at an early stage in the processing of a charge is highly desirable. Thus, if it becomes apparent to the Regional Office, even as early as the initial contacts with the parties, that a settlement or non-Board adjustment might quickly be achieved, resolution should be explored, consistent with Regional Office policy. A Regional Director must exercise care in the delegation of settlement responsibility to Board agents and supervisors, particularly before Regional Office determination on the merits of a case. Parameters may be established regarding the scope of settlement responsibility for individual Board agents, eg., requiring advanced telephonic authorization or any other appropriate limitations. The processing of the charge should not, however, be unduly delayed while settlement is pursued.

10126.2 After Regional Office Determination

Following a Regional Office determination as to the merits of a case, the Board agent should pursue settlement before issuance of complaint. Indeed, experience indicates that action taken during this period is critical in obtaining settlements.

The investigative agent is directly responsible for making these settlement efforts. In light of the effectiveness of Regional Office settlement coordinators, it is anticipated that coordinators will participate directly in settlement efforts, when appropriate, thereby increasing the likelihood of achieving settlement. In addition, other Regional Office managers, including the Regional Director, may also directly participate in settlement negotiations when warranted.

The Regional Office should carefully assess the impact that issuance of complaint will have on the likelihood of achieving a settlement. Thus, the Regional Director may choose to delay issuance for a short period, if such would be helpful. However, issuance of complaint should not be unreasonably delayed. Where it is clear that settlement at this stage will not be achieved, complaint should issue immediately.

Prior to the submission of a proposed settlement agreement to the parties, the Board agent must be certain that the proposal, if accepted by the parties, will be approved

by the Regional Director. Absent unusual circumstances, the amount of backpay should be calculated at the outset of negotiations and should be specified in the proposed settlement agreement. In an *informal* settlement, listing the amount of backpay in the notice is in the Regional Director's discretion; in a formal settlement agreement, consult Sec. 10164.6 as to this issue.

If the settlement proposal is modified during negotiations, the Board agent should caution the parties that all changes are subject to review and approval by the Regional Director. The Board agent should also stress that the Regional Office may take a different position as to settlement terms should settlement efforts fail.

10126.3 Postcomplaint

Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens. Settlement efforts after complaint should be continued in accordance with Regional Office practice by either the investigative agent, the attorney assigned to the case or the settlement coordinator. The person assigned to continue settlement negotiations should review all previous efforts and be flexible in exploring additional approaches which may lead to a settlement.

If the Regional Office has not already done so, it should submit a proposed settlement agreement in writing to the charged party promptly after issuance of complaint. The charged party should also be invited to meet with the Regional Office settlement coordinator or other appropriate Regional Office supervisory or managerial officials to discuss settlement.

10128 Techniques of Settling

10128.1 Knowledge of the Case and the Law

A complete and thorough knowledge of the facts of the case and the underlying law is essential to successful settlement efforts. Such knowledge will enable the Board agent to display the necessary confidence to represent the Regional Office effectively.

10128.2 Conduct of Board Agent

The charged party's reaction to the Board agent's initial approach to settlement of a case is important in achieving a resolution. Therefore, at all stages of settlement negotiations, particularly during the initial conference with the charged party, the Board agent should display objectivity and professionalism.

10128.3 Limitation of Disclosure During Settlement Discussions

In attempting to settle a meritorious case, the Board agent must reveal only enough information to demonstrate the merits of the Regional Office's position, but must not endanger successful prosecution of the case should settlement negotiations fail. In no event should the Board agent reveal names of witnesses or other confidential sources of information. In sum, the Board agent should focus on the complaint allegations and indicate in general terms the nature of the evidence that supports those allegations.

The following are examples of the type of information that, in appropriate circumstances, may be revealed to the charged party:

- With respect to an allegation of surveillance, inform the charged party that there is evidence from more than one witness that a supervisor [give name] was observed on the night of [give date] about [give time] in an automobile [describe] and further indicate that our witnesses have been able to describe the manner in which the supervisor was dressed.

- In an 8(a)(3) case where the charged party is asserting that the alleged discriminatee was discharged because of absenteeism, indicate that there is evidence that the supervisor orally excused the absences of the alleged discriminatee and that there is evidence from several employee witnesses that absences of a similar nature were also excused by several employer supervisors.

- In an 8(b)(7)(C) case, indicate that witnesses overheard, on a particular date and at a particular place, the business representative explaining to the steward that the purpose of picketing was not area standards, but was recognitional and organizational.

In determining the specificity of the evidence which the Regional Office may reveal, consideration should be given to the likelihood that disclosure of such information will advance the opportunity for settlement.

10128.4 Contact with the Charged Party

The Board agent should approach the charged party with a positive attitude, conveying the Regional Office's desire to resolve the dispute. In cases where the charged party is open to settlement, it may be achieved by the submission of the proposed settlement agreement followed by brief discussions. In other situations, a settlement meeting as described below should be considered and employed, where appropriate.

10128.5 Settlement Meeting with the Charged Party

Absent unusual circumstances, the initial settlement meeting should include only the charged party and its representatives. Since it is necessary to convince both the charged party and its representative of the benefits of settlement, it may be appropriate to request through the representative that both be present during settlement discussions. Although experience with a particular charged party or its representative may suggest that settlement is unlikely, it is, in most instances, worthwhile to have such a meeting to ensure that there is no misunderstanding as to the terms of the proposed settlement and the benefits of settling.

The Regional Office's representative should begin with a summary of the scope of the allegations deemed meritorious, the theory of the case and a brief description of the facts and the law supporting the Regional Office's position. As noted, the Regional Office's representative should be careful not to reveal more than is necessary about the facts of the case; however, a sufficient degree of detail should be provided in order to

persuade the charged party of the soundness of the Regional Office's case. The ability to convincingly articulate the Regional Office's position is critical at this juncture, particularly if the principals of the charged party are present during the discussions. However, the discussion should focus on settlement and should not be allowed to evolve into a protracted debate over the merits of the case.

The Regional Office's representative should explain the substance of the settlement, noting that the elements of the proposal are based upon standard Board policies with respect to the types of allegations found to be meritorious. The Regional Office's representative should listen carefully to the charged party's position and consider whether any accommodation can be made to address objections raised to the proposal.

10128.6 Factors Favoring Settlement

No matter how experienced the representatives of the charged party are, the advantages of settling versus the risk of litigation should almost always be frankly discussed. Certain common factors which may be discussed at the discretion of the Regional Office's representative are set forth below:

- The cost of litigation is often significant and it is appropriate to ask the charged party to estimate for itself such cost

- Prompt settlement allows the parties to put the dispute behind them, avoids ongoing disruption to the parties' operations and relationship and provides certainty in terms of timing and outcome

- It is advantageous to the charged party to "voluntarily" post a notice to employees pursuant to a settlement agreement, rather than posting a notice to employees pursuant to a Board Order or a Court Judgment

- Settlement avoids the emotional impact of a trial on all participants

- The charged party should be invited to assess the impact on it if the testimony of top officials is discredited or if an adverse decision is rendered

- Most often, the amount of the backpay is substantially less at the settlement stage than following protracted litigation, which could take more than a year

- Prompt settlement will allow a charged party to take advantage of current circumstances and cut off future liability, e.g., an alleged discriminatee employed elsewhere may be subsequently laid off, causing backpay liability to resume

10128.7 Contact with Charging Party

The Regional Office should keep the charging party apprised of the status of settlement efforts. The Regional Office should also inform the charging party of the advantages of settlement as well as other factors, as set forth below:

- The Regional Office's representative should discuss with the charging party the scope of the allegations deemed meritorious, the theory and the strengths and weaknesses of the case. It is particularly important that the charging party understands the scope and the limitations of the remedies to be sought in litigation.

- Alleged discriminatees should be encouraged to provide full, complete, and accurate interim earnings information.

- An individual entitled to reinstatement under the General Counsel's theory of the case should not be pressured in any way to waive reinstatement, since reinstatement is one of the most effective remedies available under the Act. Of course, for a variety of reasons, individuals may elect to waive reinstatement in response to a settlement offer from a charged party.

10130 Substance of Settlement Agreement

10130.1 Generally

Since settlements are as varied as the circumstances of cases, the principles appearing in this subsection are offered as guidelines.

Issues involving reinstatement; computation of backpay, interest, deductions and withholdings; and lump sum settlements are substantially the same as those encountered when dealing with compliance with formal Board or court decisions and orders. Accordingly, substantially the same principles described in the Compliance Manual should be applied.

Unless the amount of interest is set forth in the agreement, both formal and informal settlement agreements that provide for interest on backpay should include the following:

> Interest shall be added to [here insert backpay, dues, fees and/or assessment, as appropriate] to be computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

10130.2 Backpay

The backpay calculations should be made consistent with Agency policy and methods as set forth in the Compliance Manual and relevant General Counsel memoranda. The Board agent should be alert to include all appropriate losses in computing gross backpay, as set forth in the Compliance Manual, Sec. 10532. The procedures for calculating the offsetting interim earnings and adjustments thereto are set forth in the Compliance Manual, Secs. 10540–10546l. The parties should be advised that the standard employee Social Security contribution and payroll tax deductions must be made from the net backpay owed to the alleged discriminatees, but not from any interest or reimbursement of medical expenses.

10130.3 Reinstatement Not Immediately Available

Where, because of lawful changes in the employer's operations, reinstatement to an alleged discriminatee's former position is not feasible, it may be agreed that there will be reinstatement to another position or that employment will be offered at some time in the future. Compliance Manual, Sec. 10528. In such cases, the settlement agreement should set forth specific details in order to avoid future misunderstandings.

10130.4 Reinstatement Declined or Not Desired

If an offer of reinstatement is declined or the alleged discriminatee does not desire reinstatement, the settlement agreement should so state. In such circumstances, any alleged discriminatee who is not a charging party should execute a separate waiver of reinstatement.

10130.5 Joint and Several Liability

In companion CA-CB cases growing out of the same acts of discrimination, the settlement agreements may require the charged employer and the charged union jointly and severally to make whole the alleged discriminatees. Under the concept of joint and several liability, if one party fails to meet its obligation, the other party is responsible for the entire amount. It is advisable to ascertain the exact amount of the liability and to apportion it appropriately within the settlement agreement so long as there is no concern about either party fulfilling its commitment. Where there is such concern, the agreement should not attempt to apportion the liability between the employer and the union.

In cases in which all charged parties indicate a desire to settle, each should pay its equal share. If one charged party is willing to settle, but the other insists on trial of the case, a settlement agreement may be taken from the party willing to settle. Appropriate provisions should, however, assure that the settling charged party will bear only its proportionate share of the backpay liability, unless efforts to obtain payment of the remaining portion of the backpay from the other respondent(s) should fail following successful prosecution of the case. It is suggested that the full amounts of backpay (including the portion owed by the party refusing to enter into the settlement) be set opposite the names of the alleged discriminatees in the "make-whole" provisions of the agreement and that language similar to the following be inserted in another paragraph of the agreement:

> For purposes of this agreement [stipulation], the respective amounts of backpay set forth herein represent the full loss of earnings of these employees respectively to this date. Upon [approval of this agreement] [entry of a Board order pursuant to this stipulation], [the settling charged party] will pay immediately to each of said employees one half of the amount set forth opposite that individual's name. If the General Counsel succeeds in litigation against [the other charged party], [the settling charged party] will pay the remaining portion of each such amount on being informed by the Regional Director that reasonable efforts to obtain payment from [the other charged party] have failed.

10130.6 Departure from Equal Proportions Basis

One of two potential joint-and-several charged parties may be willing to settle by paying its share of the backpay, as well as the share of the other charged party. Such offer should not be solicited as part of the settlement agreement. However, if such desire is a voluntary one and all reasonable efforts to obtain settlement from the other charged party have failed, full payment may be accepted from one in order to avoid hardship to the individuals involved. Any such agreement should provide the following:

- The Regional Office may, in all other respects, process the case further against the other charged party
- The payment satisfies the make whole requirements
- The Regional Office will not seek any payment from the other charged party

In certain circumstances, including where the acceptance of such a settlement offer is contrary to the public interest, the Regional Office should reject the offer.

For a period when only one charged party is liable, the agreement should provide for backpay liability only for the one charged party. For example, a labor organization may toll its liability for backpay by giving notice to the employer and the employee involved that it no longer objects to the employment of the alleged discriminatee by the charged employer. Under these circumstances, backpay liability should not be apportioned for the period after the charged union has tolled its liability.

10130.7 Insolvent Charged Parties

When there are several charged parties involved in a case and one or more becomes insolvent before paying its share, the unpaid amount should be solicited without delay from the other charged parties. (See Compliance Manual, Secs. 10596 and 10600 regarding issues of derivative liability and charged party's inability to comply, respectively.)

10130.8 Nonadmission Clauses

Nonadmission clauses should not be routinely incorporated in settlement agreements. A nonadmission clause may be incorporated in a formal settlement only if it provides for a court judgment. Sec. 10168, par. 10. It is Board policy that nonadmission clauses should not be included in notices. See *Independent Shoe Workers of Cincinnati, Ohio (U.S. Shoe Corp.),* 203 NLRB 783 (1973). If it comes to the Regional Office's attention that the charged party intends to post a settlement agreement containing a nonadmission clause along with the notice, the Regional Office may wish to consider denying the charged party's request for the nonadmission clause. See *Bangor Plastics, Inc.*, 156 NLRB 1165 (1965), enf. denied 392 F.2d 772 (6th Cir. 1967). In the alternative, the Regional Office may require a clause in the settlement agreement that prohibits the Charged Party from posting such a settlement agreement with the notice.

10130.9 Position of Alleged Discriminatees

If the charged party wishes to know whether alleged discriminatees desire reinstatement and the amount of backpay due, every effort should be made to ascertain and convey this information. However, experience demonstrates that alleged discriminatees often defer taking a position on reinstatement until the charged party makes a bona fide offer of settlement. Moreover, no effort should be made to persuade the alleged discriminatees to waive reinstatement for the purposes of obtaining a settlement.

10130.10 Exclusive Hiring Hall Remedies

In many instances, referrals to jobs pursuant to an exclusive hiring hall arrangement are made from a list based on seniority, the number of hours worked or other criteria. Careful consideration should be given to the hiring hall standing of the alleged discriminatee in settling this type of case. The settlement agreement, in addition to backpay, should provide that the alleged discriminatee be given credit in the hiring hall formula based upon the employment allegedly denied.

10130.11 *Beck* Remedies

Cases involving *Beck* objectors, that is, nonmembers covered by a contractual union security clause who object to paying fees for union activities unrelated to collective bargaining, contract administration or grievance adjustment, often raise complex remedy issues. *Communications Workers v. Beck*, 487 U.S. 735 (1988). The Regional Office should take care to follow the most recent Board decisions in formulating proposed settlements. GC Memo 98-11.

10130.12 Remedial Initiatives

The Agency has a responsibility to periodically reexamine and update its remedial strategies. Accordingly, the Regional Office should be alert to any remedial initiatives which the General Counsel has decided to pursue. Under most circumstances, before seeking a nontraditional remedy the Regional Office must first seek authorization from the Division of Advice. See GC Memo 00-03 and OM 99-79.

10132 Notices to be Posted

10132.1 Generally

Settlement agreements should provide for posting of a notice to employees or union members that reassures employees or employees and members of their rights under Section 7 and that outlines the action taken in connection with the settlement. The posting should be for 60 consecutive days, unless prior clearance has been obtained from the Division of Advice. GC Memo 00-03.

10132.2 Preparation and Forms

The notices to be posted should be prepared by the Regional Office on approved notice forms. OM 02-44. Posting of photocopies in lieu of the Agency furnished notice is not acceptable, as such would detract from the formality of the settlement.

Informal Settlement

Forms NLRB-4722 and 4724 (Notice to Employees)

Forms NLRB-4781 and 4782 (Notice to Employees and Members)

Formal Settlement

Forms NLRB-4727 and 4728 (Notice to Employees)

Forms NLRB-4758 and 4759 (Notice to Employees and Members)

The caption of a notice in a formal settlement should contain the following as appropriate:

> "Pursuant to a stipulation providing for a Board Order" or "Pursuant to a stipulation providing for a Board order and a consent judgment of any appropriate United States Court of Appeals"

10132.3 Notice Language

While there is considerable latitude in language to be used in the notice, Regional Offices should, in general, follow the substance of notices in Board orders in comparable cases. The notice language should be readily understandable to employees. See *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001), and OM 02-43. Although it is proper to require the posting of a notice that declares publicly that a party will conform *in the future* to the mandates of the Act, it is improper to force a party to confess past guilt. *NLRB* v. *Express Publishing Co.,* 312 U.S. 426, 438–439 (1941). Thus, notices may not

be phrased so as to require a charged party to admit a violation of the Act, either directly (e.g., "We violated the law when we fired John Smith.") or by implication (e.g., "We will not fire anyone for union activity *again.")*.

10132.4 Posting

The appropriate posting site for notices depends on the type of charge and the circumstances. During settlement discussions, the Board agent should obtain the charged party's commitment to post the notices at specific places consistent with posting requirements set forth in NLRB Form 4775, Settlement Agreement. If it is apparent that a posting will not effectively reach the employees, consideration should be given to requiring the mailing of the notice to the employees at the charged party's expense.

The number of notices to be posted and the location of the posting will depend on various factors, including the size of the facility, the type of alleged violation and the extent to which knowledge of the alleged conduct was disseminated.

If the charged party is a union, notices should be posted by the union, both on bulletin boards located at its office and meeting halls, as well as at the facility of the employer involved, if possible. Signed copies of the notices should also be supplied for the employer to post at its facility, if willing.

Settlement agreements entered into in related CA and CB cases (where the employer and the union are jointly and severally liable) should provide for posting of both the charged union's notice and the charged employer's notice at the same places and under the same conditions.

In unusual circumstances, the posting and/or mailing of the notice may be viewed as insufficient. Examples of such cases include an unlawful hiring hall that affected employment of persons who are widely scattered or unidentified, or where the unlawful activities involve general or widespread practices. In such cases, publication in a daily newspaper of general circulation, as opposed to publications serving only specialized groups of readers, should be required. Such publication should be at the charged party's expense and on 3 separate days within a 1-week period designated by the Regional Office. Such publication should be in addition to, not a substitute for, such other notice posting as is required by the circumstances.

10134 Parties to Informal or Formal Settlements

10134.1 Charged Party

The charged party is a necessary signatory to any informal or formal settlement.

10134.2 Charging Party

In all cases, it is desirable to have the charging party enter into a settlement, since a bilateral settlement reflects mutual satisfaction with resolution of the dispute and avoids delay in the implementation of the settlement resulting from dismissal of the charge and possible appeal.

If the charging party is unwilling to execute the proposed settlement agreement but the Regional Office nonetheless concludes that it is appropriate to accept it, the Regional Director or the Administrative Law Judge may approve a unilateral settlement. See Secs. 10150 and 10164.7 on informal and formal settlements, respectively.

A charging party which does not wish to enter into the agreement but has no real objections to the remedial action proposed may be willing to sign a separate document in which it acknowledges the contents of the agreement and that it has no objections to the agreement or will not appeal from a dismissal based on the settlement.

10134.3 Necessary Parties to Settlement

In every case in which the contemplated settlement provides for the disestablishment of a labor organization, or for the withdrawal and/or withholding of recognition from a labor organization, or for ceasing to give effect to part or all of an existing collective-bargaining agreement, both the employer and labor organization should be a party to the settlement. Thus, a necessary entity not charged in the case should execute the settlement as a party in interest.

Should such a party in interest decline to execute the settlement agreement, the agreement should not be approved unless:

(a) The party in interest files with the Regional Director a letter or other document stating that it has knowledge of the proceedings and of the contemplated settlement and that it waives any right to be a party to the proceedings or to contest the settlement or

(b) In the case of a dissolved labor organization, the last executive officer of that organization files with the Regional Director a statement certifying that the organization is dissolved and out of existence and that it does not claim to represent any of the employees in the unit involved.

Where, in a formal settlement, the actions set forth in either (a) or (b) has occurred, the letter, document or statement must be made part of the record. Sec. 10166.3.

10134.4 Nonparticipation of Necessary Parties

Where the participation of other necessary parties cannot be obtained, it is necessary that the counsel for the General Counsel proceed formally. The allegedly dominated organization, for example, should be served with complaint and notice of hearing. If it fails to appear, only the respondent, charging party, and the General Counsel remain as participants in the case. Under such circumstances, they may enter into a settlement stipulation reciting the facts of service on, and nonappearance of, the 8(a)(2) union.

10136 Settlement Issues in Priority Cases

Certain unique issues that may arise in settlement of CC, CD, and CE cases are addressed herein as indicated below.

- Notices in CC Cases: Sec. 10204
- Settlements and Disclaimers in CD Cases: Sec. 10220
- Settlements in CE Cases: Sec. 10224
- Nonparticipation of Necessary Parties in CE Cases: Sec. 10224.2

10140 Non-Board Adjustments

In addition to Board settlements, unfair labor practice charges may be resolved through a specific agreement between the parties, including grievance settlements, or as a result of unilateral action taken by the charged party which satisfies the charging party. Non-Board adjustments result in the withdrawal of the charge or, in limited circumstances, dismissal.

10140.1 Policy

It is well-established Board policy, consistent with the preamble of the Act, to encourage voluntary resolutions of disputes between employers and unions. Accordingly, the Regional Office should encourage the parties to resolve unfair labor practice issues between themselves. However—and this is particularly important where rights of individuals are involved—the parties should be informed that any withdrawal request based upon such resolutions will be subject to the Regional Director's approval.

10140.2 Unrepresented Individuals

In cases involving individuals not represented by a union or an attorney, the Board agent should make known to the charging party the Regional Office's willingness to participate in any settlement discussions and its availability for consultations as to the requirements of a Board settlement, the relative strength of the case, and the impact of any proposed non-Board adjustment on further proceedings in the case.

10140.3 Not Policed by Agency

The parties should be advised that non-Board adjustments do not have the Board's approval and are not policed by the Agency.

10142 Processing of Non-Board Adjustments

Upon being notified of a charging party's desire to withdraw a case based on a non-Board adjustment, the Board agent should obtain the terms of the adjustment.

The approval of the withdrawal request should be granted or withheld in accordance with criteria set forth in Sec. 10142.4. In those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that

the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in the private negotiations.

A Regional Director's discretion to reject a settlement reached between the parties is governed by the standards set forth in *Independent Stave Co*., 287 NLRB 740 (1987), and *Alpha Beta Co*., 273 NLRB 1546 (1985).

10142.1 Section 10(b) and Non-Board Adjustments

Generally, Board policy does not permit the reinstatement of charges, which have been withdrawn with Regional Director approval, outside the statue of limitations set forth in Section 10(b) of the Act. *Winer Motors,* 265 NLRB 1457 (1982). Accordingly, the Regional Office should take into consideration the strictures of Section 10(b) in deciding whether to approve a withdrawal request before all of the requirements contemplated by the non-Board adjustment have been carried out. Approval may be withheld or granted conditionally, pending full performance of the requirements of the parties' private adjustment.

10142.2 Approval of Withdrawal

In the normal situation, when all of the requirements of the non-Board adjustment have been carried out, the Regional Office should issue a letter approving the withdrawal request.

If approval is granted, a determination should be made as to whether the case should be closed as *adjusted*, i.e., if the terms of the resolution provide for a substantial remedy, consistent with the purposes of the Act.

If approval of a withdrawal request, proffered on the basis of a non-Board adjustment, is withheld, the parties should be so notified and the investigation should continue. Procedures for approval of a withdrawal based upon a non-Board adjustment after a hearing opens are set forth in Secs. 10154.5 and 10154.6.

10142.3 Conditional Withdrawals

The Regional Office may also choose to approve a withdrawal conditioned upon the charged party carrying out its obligation under the non-Board adjustment. In such circumstances, the following language should be used in the letter conditionally approving the withdrawal:

> Your request to withdraw the charge you filed against [charged party] is based upon a private agreement between the parties on the matters underlying this charge. I have approved this withdrawal request, conditioned on the performance of the undertakings in the private agreement between the parties. The charge is subject to reinstatement for further processing if the charging party's request for reinstatement is supported by evidence of noncompliance with the undertakings in the private agreement.

Since the Regional Office may be called upon to determine whether there has been a breach of the private non-Board adjustment, care must be taken by the Board agent to insure that the terms of the resolution are clear and understood by all parties.

10142.4 Withdrawal or Dismissal Based on Unilateral Action

A charged party may, on occasion, take adequate remedial action without being willing to enter into a written settlement agreement or to acknowledge by a posted notice that the action is being taken pursuant to settlement of a charge. Some examples include: interrupted bargaining negotiations that resume; an alleged discriminatee who is offered reinstatement with backpay; and a union that ceases striking for an illegal objective.

In such circumstances, the case may be disposed of administratively as set forth below:

(a) *Withdrawal:* When unilateral remedial action is accompanied by a voluntary withdrawal request from the charging party, approval of the request should ordinarily be granted. The case may be closed as adjusted and the parties should be sent a letter approving the withdrawal request.

(b) *Dismissal:* When unilateral remedial action is not accompanied by a withdrawal request, the Regional Director must then determine whether effectuation of the purposes of the Act calls for further proceedings. If the action taken is a full or substantial remedy in fact, if there is no history of prior similar practices by the same charged party and if there is no likelihood of recurrence, the charge may be dismissed on the ground that effectuation of the purposes of the Act does not warrant further proceedings. The case, when closed, should be considered adjusted.

10142.5 Representation Case Implications of Non-Board Adjustments

The Board agent should consider the impact of a non-Board adjustment on related representation cases. For example, a non-Board adjustment which encompasses the obligation to bargain and an extension of the certification year is recognized by the Board. *Straus Communications v. NLRB,* 625 F.2d 458 (2d Cir. 1980); *Gulf States Manufacturers v. NLRB,* 598 F.2d 896 (5th Cir. 1979); *Vantran Electric Corp.,* 231 NLRB 1014 (1977), enf. denied 580 F.2d 921 (7th Cir. 1978). Cf. *Deister Concentrator Co.,* 253 NLRB 358 fn. 2 (1980). Therefore, in order to avoid disputes as to the terms of the adjustment, the parties should memorialize in writing any agreement to extend the certification year. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

The non-Board settlement of unfair labor practice charges involving allegations of employer misconduct concerning the filing of a decertification petition, improper withdrawal of recognition, or repudiation of a bargaining obligation requires the dismissal of any decertification petition filed after the alleged conduct. *Liberty Fabrics, Inc.,* 327 NLRB 38 (1998); *Supershuttle of Orange County, Inc.,* 330 NLRB 1016 (2000). Sec. 11733.2.

In postelection proceedings, the impact of a non-Board adjustment of 8(a)(3) allegations on the resolution of a determinative challenged ballot or timely-filed objections relying upon an 8(a)(3) finding must be considered. For example, the parties should stipulate in the R case whether or not the employee whose discharge was resolved in the C case was eligible to vote in the election.

10146–10154 INFORMAL SETTLEMENT AGREEMENTS

10146 Nature of Informal Settlement Agreements

10146.1 Generally

An informal settlement agreement is a Board document providing that the charged party will take certain action to remedy the unfair labor practices deemed meritorious. It requires approval of the Regional Director or, after the record opens and evidence is adduced in a C case trial, an Administrative Law Judge. Unlike a formal settlement, an informal settlement agreement does not provide for a Board Order or a court decree.

Informal settlement agreements are preferred over non-Board adjustments as a method of resolving meritorious unfair labor practice charges. Consideration of whether to accept an informal settlement, rather than require a formal settlement, should include, inter alia, consideration of whether there is a history of unfair labor practices by the same charged party.

10146.2 Settlement Agreement Forms

The standard Agency settlement agreement forms should be used in every case where an informal settlement is proposed. (Form NLRB-4775 is approved by a Regional Director and Form 5378 is approved by an Administrative Law Judge.) These forms are applicable regardless of whether the charged party is an employer or a labor organization. The notice is an integral part of the settlement agreement and should be attached to the settlement agreement form and initialed by the parties who execute the agreement. Any changes to the standard language of the form should be clearly identified in an attachment.

10146.3 Scope of the Agreement/Reservation of Evidence

The standard settlement agreement forms contain language regarding the scope of the agreement which expressly provides that the settlement agreement applies only to the specific case involved. The Board held in *B & K Builders,* 325 NLRB 693 (1998), that the "Scope of the Agreement" language is sufficiently specific to avoid the "settlement bar rule" established in *Hollywood Roosevelt Hotel Co.,* 235 NLRB 1397 (1978). In *Hollywood Roosevelt*, the Board held that a settlement, if complied with, will be held to bar subsequent litigation of all prior violations, except where they were not known to the General Counsel or readily discoverable by investigation or were specifically reserved from the settlement by mutual understanding of the parties.

The standard scope of the agreement clause also permits the General Counsel to utilize the evidence obtained in the settled case in the litigation of other cases. The language of the Scope of the Agreement clause should be included in every settlement agreement.

10146.4 Special Provisions in 10(j) and (l) Cases

When a 10(j) or (l) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Since an interim injunction terminates by operation of law upon the Board's final disposition of a case, postponing withdrawal of the complaint allows the interim injunction to remain in effect until the Regional Office is assured that there has been compliance with the settlement. Such an arrangement ensures that the respondent remains under the legal restraint of the interim injunction, which is enforceable by contempt proceedings. In the event respondent breaches the settlement, the settlement is set aside and the complaint is litigated while the injunction remains in effect. OM 01-62.

In this connection, when settling a case in which a 10(j) or (l) injunction has been obtained, the Regional Office should strike the final sentence in the paragraph "Refusal to Issue Complaint" and substitute the following by an attachment:

> The Complaint and any Answer(s) in [the captioned administrative cases and numbers] shall be withdrawn upon closing of these matters on compliance. Respondent agrees not to move to vacate, modify, dissolve, clarify or alter the injunction decree in [caption and case number of the 10(j) or (l) decree] on the basis that this Settlement Agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the 10(j) or (l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the 10(j) or (l) decree] will continue in full force and effect for all purposes.

If a 10(l) decree is obtained prior to the issuance of the ULP complaint, the first sentence should be modified to provide that the charge will remain pending until the case is closed on compliance.

If a respondent is unwilling to accept this language as part of a settlement agreement, the Regional Office should consult with the Injunction Litigation Branch.

10146.5 Settlements to be Patterned After Board Orders

In drafting language for a settlement agreement and notice, Board agents should be careful to include language readily understandable to employees that is based on provisions in both Board orders and notices in similar cases. Patterning the settlement agreement after a Board notice alone may result in the omission of important aspects of an appropriate remedy.

10146.6 Partial Settlements in a Single Case

Although partial settlements in a single case are not common, Regional Directors have discretion, in appropriate circumstances, to approve such settlements.

(a) *Partial Settlement and Complaint on Other Allegations:* If certain unfair labor practice allegations in the same charge are not resolved by the settlement and these remaining allegations are being, or will be, processed further, the settlement agreement should specifically exclude these allegations from the agreement. For example: "This settlement does not remedy the allegation [that John Doe was terminated by the Charged Party on or about January 2, 20_] or [that the Charged Party failed to process John Doe's January 2, 20__ grievance for reasons that are arbitrary, invidious and discriminatory]." Additionally, the settlement should provide that the evidence bearing on the settled allegations may be introduced at any hearing on the unsettled allegations. In the case of a partial unilateral settlement, the portion of the charge that is settled must be dismissed. Sec. 10150.

(b) *Partial Settlement and Dismissal of Other Allegations:* If the charged party agrees to settle all allegations of a single charge deemed meritorious and other allegations of the same charge are dismissed, the settlement should not normally be approved prior to the expiration of the appeal period for the dismissed allegations, if no appeal is filed, or the denial of the appeal on the dismissed allegations. If the appeal is sustained, the Regional Office should attempt to include in the settlement the allegations found meritorious on appeal. If such efforts fail, the charged party is still willing to be a party to the partial settlement, and the Regional Director concludes that under all the circumstances it would be appropriate to approve the partial settlement, refer to procedures set forth in paragraph (a) above. Otherwise, all meritorious allegations should be handled together.

10148 Bilateral Informal Settlement Agreements

Bilateral informal settlement agreements are entered into by both the charged and the charging party and approved by the Regional Director or an Administrative Law Judge.

10148.1 Conformance of Settlement Agreement and Charge

If an informal bilateral settlement agreement by its terms does not dispose of all violations alleged, but is nevertheless intended by the parties to be a full resolution, the charge should be amended to conform to the settlement. Alternatively, a sentence should be inserted in the settlement that "This settlement disposes of all unfair labor practices alleged in the charge."

10148.2 Action on Approval of Settlement Agreement

The Regional Office should promptly inform the parties of the approval of a bilateral settlement agreement and instruct the charged party to immediately comply with it. The charged party, through an attorney or representative, should be requested immediately to take the action called for in the agreement. The charged party should be

furnished with sufficient copies of the notice and be given whatever other assistance the Regional Office can render toward carrying out the agreement.

10148.3 Responsibility for Compliance

The Regional Office is responsible for ensuring compliance with the provisions of settlement agreements.

10148.4 Closing of Case

When the Regional Director is satisfied that the provisions of the informal settlement agreement have been carried out, including the passage of the notice-posting period, the case should be closed on compliance and the parties should be so notified. The notification should specifically state that the closing is conditioned on continued observance of the terms of the settlement agreement.

10150 Unilateral Informal Settlement Agreements

Unilateral informal settlement agreements are entered into by the charged party, but not the charging party, and approved by a Regional Director or an Administrative Law Judge.

10150.1 Notification to Charging Party

If the Regional Office anticipates that the charging party may not enter into the settlement, the Regional Office should send to the charging party a copy of the settlement agreement and a letter briefly explaining why the settlement should be approved. The charging party should also be informed that any objections to the settlement, together with supporting argument, should be submitted in writing to the Regional Office within 7 days after service of the letter. This procedure is specifically set forth with respect to postcomplaint settlements in Sec. 101.9(c)(1), Statements of Procedure.

10150.2 Dismissal of Charge

If the Regional Director concludes that the charging party's objections do not preclude approving the unilateral settlement agreement, it should be approved and the charge should be dismissed based on the terms of the agreement. The dismissal letter should include a brief statement of the reasons for the approval, address the charging party's objections and contain the standard appeal language. The letter should also include the following paragraph:

> In view of the undertakings contained in the attached settlement agreement, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time. I am, therefore, refusing to issue [reissue] complaint in this matter.

A copy of the approved agreement should be attached to the dismissal letter.

10150.3 Timing for Compliance

After the expiration of the appeal period, if no appeal has been filed, the Regional Office should instruct the charged party to take the action called for in the agreement. If an appeal has been filed, the instruction is not given unless and until the Office of Appeals has upheld the dismissal. In either case, the responsibility for compliance and the closing of the case should be in accord with the procedures described in Secs. 10148.1–.3.

If the Regional Office learns that the charged party has commenced or will commence performance of the terms of the agreement prior to being so instructed by the Region, the Region should inform the charged party that a determination by the Office of Appeals may require additional remedial action. If additional remedial action is required, the charged party should generally not be required to take any action already performed in compliance with its initial settlement obligations.

10152 Noncompliance with Settlement Agreements

If it appears that the charged party is not complying with the settlement agreement, the Regional Office should notify the charged party of this concern and provide it with an opportunity to fully comply. The charged party should also be advised that failure to fully comply with the settlement agreement will result in the revocation of the approval of the agreement and the issuance or reissuance of the complaint.

Should the above efforts prove unsuccessful, the Regional Director may issue a letter informing the parties of the intention to revoke approval of the settlement agreement. Thereafter, complaint will be issued or reissued, including an Order Revoking Approval of the Settlement Agreement. At hearing, counsel for the General Counsel will have the burden of establishing noncompliance with the agreement, as well as the merits of the alleged unfair labor practices. See Sec. 10146.4 regarding 10(j) and (l) cases.

10154 Postcomplaint Settlement Agreements and Non-Board Adjustments

10154.1 Settlement Agreement Executed Prior to Opening of Hearing

Regional Directors have the authority to approve informal settlement agreements executed at any time prior to the opening of the hearing and, on such approval, to withdraw the complaint. Form NLRB-4775 serves both of these purposes. After the settlement agreement is executed, the Regional Office should immediately notify the Division of Judges.

10154.2 Role of Settlement Judge

Pursuant to an agreement by the parties, the Chief Administrative Law Judge may assign a judge, other than the trial judge, to conduct settlement discussions and preside over settlement negotiations between the parties. All discussions between the parties and

the settlement judge are confidential; the settlement judge does not discuss any aspect of the case with the trial judge. (See Sec. 102.35(b)(1)–(6), Rules and Regulations, Sec. 10351, and OM Memo 95-12 for a complete discussion of the role of a settlement judge.)

10154.3 Role of Trial Judge in Settlement Efforts

Before the hearing opens, the Administrative Law Judge assigned to the trial may advise the parties of the importance to the Board of settlements; invite them to take advantage of the opportunity to further discuss settlement; assure them that reasonable good-faith requests for hearing recesses for the purpose of pursuing settlement will be granted; inform them that settlement efforts will in no way be construed as a sign that their case is weak; and recess the hearing at specific times to urge reconsideration by the parties of the advisability of settling the case.

10154.4 Approval of Settlement Agreement After Hearing Opens

Where the hearing has opened but no evidence has been introduced, the Regional Director has the authority to approve a settlement agreement. *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992). Once evidence has been introduced, but prior to the issuance of a decision, any settlement agreement must be submitted to the Administrative Law Judge for approval. Sec. 101.9(d), Statements of Procedure.

If an agreement is reached after the hearing has been adjourned or is closed, the settlement agreement should be submitted to the ALJ for approval. The ALJ's action is, thereafter, indicated by issuance of an appropriate order and notification to the parties.

If a settlement agreement is approved by the ALJ, counsel for the General Counsel should move for an indefinite adjournment. After compliance has been effected, counsel for the General Counsel should promptly file with the ALJ a motion to withdraw the complaint and close the record.

If a respondent fails to comply with a settlement agreement approved by an ALJ, counsel for the General Counsel should move the ALJ to set aside the settlement agreement and reschedule the hearing.

10154.5 Approval of Withdrawal of the Charge After Hearing Opens

Where the hearing has opened but no evidence has been introduced, the Regional Director has the authority to approve a request to withdraw a charge. *Sheet Metal Workers Local 28 (American Elgen)*, supra.

Once evidence has been introduced but prior to the issuance of a decision, any request to withdraw the charge must be submitted to the Administrative Law Judge for approval. Sec. 101.9(d), Statements of Procedure. If the charge is being withdrawn based on a non-Board adjustment between the private parties and the Regional Office does not intend to appeal the ALJ's approval (Sec. 10154.6), the trial attorney should move for an indefinite adjournment to permit compliance with the terms of the non-Board adjustment. After compliance with the terms of the agreement, counsel for the General Counsel should file with the ALJ a Motion to Approve Withdrawal of the Charge, Dismiss the Complaint and Close the Case. Sec. 101.9(d), Statements of Procedure and Sec. 10275.3.

10154.6 Appeal from Administrative Law Judge's Approval of a Settlement Agreement or Withdrawal of the Charge

(a) *Appeal from an Administrative Law Judge's Approval of a Settlement Agreement:* If the Administrative Law Judge is presented with a settlement agreement that counsel for the General Counsel opposes, counsel should express on the record the basis for the objection. If the Regional Office determines that it is appropriate to appeal the ALJ's ruling approving the settlement agreement, the appeal should be promptly filed with the Board pursuant to Sec. 102.26, Rules and Regulations.

(b) *Appeal from an Administrative Law Judge's Approval of a Withdrawal:* If, after the record opens, the private parties reach a non-Board adjustment that the Regional Office does not believe will effectuate the purposes of the Act after considering the factors set forth in *Independent Stave Co*., 287 NLRB 740 (1987), the reasons for the Regional Office's opposition to the charging party's withdrawal of the charge should be clearly expressed on the record. If the Administrative Law Judge approves the withdrawal over the trial attorney's objection, the trial attorney should consult with the Regional Office to determine whether a request for special permission to appeal the ALJ's ruling should be made to the Board, pursuant to Sec. 102.26, Rules and Regulations. Such an appeal should be filed promptly. In the event the ALJ dismisses the complaint based upon a withdrawal of the charge, a request for review should be filed within 28 days in accordance with Sec. 102.27, Rules and Regulations.

10154.7 Approval of a Withdrawal of the Charge or a Settlement Agreement After Administrative Law Judge Decision

Although a respondent should be encouraged to comply with an Administrative Law Judge's Order, at times the private parties reach an appropriate non-Board adjustment or an informal bilateral settlement agreement after the issuance of an ALJ's decision while the case is pending at the Board. If the Regional Office determines that such adjustment or settlement effectuates the Act, counsel for the General Counsel should file with the Board a Motion to Remand the Case to the Regional Director for the purpose of approving the adjustment or settlement. The Motion should state the terms of any agreement reached between the parties.

10164–10170 FORMAL SETTLEMENT STIPULATIONS

10164 Nature of Formal Settlement Stipulations

10164.1 Generally

A formal settlement is a written stipulation providing that, on approval by the Board, a Board order in conformity with its terms will issue. Ordinarily, it will also provide for the consent entry of a court judgment enforcing the order. Sec. 101.9(b)(1), Statements of Procedure.

10164.2 Parties

Normally, respondent, the charging party and the General Counsel are parties to the formal settlement stipulation. However, the Regional Office can accept an appropriate unilateral formal settlement, subject to approval by the General Counsel and the Board. The Regional Office should also include in the formal settlement stipulation all parties necessary to such agreement. Secs. 10134.3 and 10264.3–.4.

10164.3 Overview

A formal settlement stipulation requires issuance of a complaint. If a complaint has not issued, one must issue in conjunction with the settlement. A formal settlement may be appropriate in certain circumstances, such as where there is:

- A history of prior unfair labor practices
- A likelihood of recurrence or extension of the instant unfair labor practices
- Continuing violence or a likelihood of recurring violence or
- A backpay installment schedule covering an extended period of time

The settlement should include a waiver of notice of hearing as well as a waiver of the hearing itself.

When it appears that respondent's purpose in refusing to execute a formal settlement stipulation is its belief that a Board Order can be avoided by complying with the Administrative Law Judge's decision that will issue after hearing, respondent should be apprised that, under the Act, Sec. 102.48, Rules and Regulations and Sec. 101.11, Statements of Procedure, a Board Order will issue even though respondent does not file exceptions to the ALJ's decision and agrees to comply with the ALJ's recommended Order.

In the absence of unusual circumstances, a respondent who executes a formal settlement should not be permitted to withdraw from the stipulation after approval by the Regional Director or the General Counsel, as appropriate. *George Banta Co.,* 236 NLRB 1559 (1978). In the event that respondent attempts to withdraw from the settlement while it awaits approval by the Board, the Regional Office should immediately submit the matter, with its recommendation, to the Division of Advice. GC Memo 00-03.

10164.4 Basic Record

The formal settlement provides a stipulation as a substitute for a hearing. The basic record available to the Board and the court consists of the charge, the complaint, and the stipulation. If the charge does not conform to the complaint on which the stipulation is based, an amended charge should be secured if possible. The answer, if filed, should normally be withdrawn, but may be incorporated into the record if respondent insists.

10164.5 Court Judgment Preferred

A formal settlement providing for a court judgment is preferred, since judgments serve as more effective deterrents to future violations of the Act. If respondent consents to the entry of a court judgment, it is possible to include a nonadmission clause in the stipulation. If respondent will not execute a stipulation providing for the entry of a court judgment, a request for a nonadmission clause must be rejected, since such a clause could create a question regarding the enforceability of the stipulation. Moreover, in the absence of consent to a court judgment, respondent must admit the allegations of the complaint.

Where a formal settlement provides for a court judgment, entry of such a judgment will be sought. The Board agent negotiating the formal settlement should take affirmative measures to make it clear that the stipulation contemplates the entry of a Board order and court judgment, even though the Board order may have been complied with in the interim.

Even if a formal settlement does not provide for a court judgment, entry of such a judgment may be sought in appropriate circumstances.

10164.6 Backpay Provisions

In a formal settlement the exact amount of backpay agreed upon should be set forth rather than be left for future computation. The amount should be specified in the stipulation and may be included in the notice. In order to guard against further loss of earnings that may be incurred because of a delay in compliance, a provision that respondent will make whole the discriminatees for any additional loss of earnings, plus interest caused by a failure to offer timely reinstatement consistent with the terms of the settlement, should be included. Where such a provision is used, the stipulated order should provide also that all payroll and other records necessary to a determination of backpay due will be made available to the Regional Office. If the settlement provides for installment payments, the payment schedule should be incorporated into the settlement. Under such circumstances or if respondent's financial condition is doubtful, the Regional Office may require a security agreement as part of the settlement.

10164.7 Obtaining Approval of Formal Settlement Stipulation

Before transmittal to the parties, a formal settlement should be reviewed for conformance to Regional Office policy.

(a) *Formal Settlement Stipulation Before Hearing Opens:* When entering into a formal settlement stipulation before hearing opens:

1. The Board agent should make clear that the settlement is subject to approval by the Regional Director or the General Counsel, depending upon the circumstances, and ultimately by the Board.

2. Regional Directors have been delegated the authority to approve bilateral formal settlements on behalf of the General Counsel. They should submit such settlements directly to the Executive Secretary for approval by the Board. GC Memo 94-10.

3. Unilateral settlements must be submitted to the Division of Advice for approval by the General Counsel before they are submitted to the Board. GC Memo 00-03. The procedures for a charging party to object to the approval of a formal settlement are set forth in Secs. 101.9(c)(1) and (2), Statements of Procedure.

(b) *Formal Settlement Stipulation After Hearing Opens:* When entering into a formal settlement agreement after hearing opens:

1. Whether the settlement is all-party or unilateral, whether the hearing is in progress and evidence introduced or has been adjourned or closed and before decision, a formal settlement stipulation must be submitted to the Administrative Law Judge for approval pursuant to Sec. 101.9(d)(1), Statements of Procedure. If the ALJ approves the settlement while the hearing is in progress, the hearing should be adjourned indefinitely pending the Board's action on the stipulation. If formal settlement is reached after the hearing has been adjourned or closed, but before issuance of a decision, the agreement should be submitted to the ALJ for approval. The ALJ may issue an appropriate order and notify the parties.

2. On approval by the ALJ, the Regional Office should assume the responsibility for transmission of the formal settlement and the required number of documents constituting the formal record to the Board for final approval. Sec. 10172.5.

3. When an ALJ refuses to approve a settlement agreement, or approves a unilateral settlement, counsel for the General Counsel or any other aggrieved party may ask for leave to appeal to the Board, as set forth in Sec. 101.9(d)(2), Statements of Procedure and Sec. 102.26, Rules and Regulations.

10164.8 Transmittal Memorandum

The Region should prepare a transmittal memorandum to assist in the review of the formal settlement agreement. The transmittal memorandum should explain the details of the agreement, emphasizing any unusual facts or deviations from standard provisions. In particular, the memorandum should specify the alleged violations the proposed order intends to remedy.

The transmittal memorandum should address the following issues:

- The extent of the remedy regarding backpay, reinstatement/instatement, and notice posting. If the settlement agreement does not provide for a complete remedy, the memorandum should explain the circumstances. For example, the memorandum should note if discriminatees have waived reinstatement and have agreed to a reduction in backpay.
- If backpay is paid through installments based upon a respondent's financial condition, the circumstances of such condition should be explained. In addition, the memorandum should reference any provisions and security arrangements regading future payments.
- Any unusual remedies.
- Any deviation from normal time limits for compliance.
- Any notice provisions which do not mirror the proposed order or do not conform to provisions normally ordered by the Board.
- If applicable, explain the lack of a provision for entry of a court judgment.
- If applicable, explain the necessity for a broad cease-and-desist order.
- If applicable, set forth the provisions of the settlement agreement that respondent has already complied with.
- In a unilateral settlement, discuss any objections that have been raised.

In a bilateral formal settlement, the original and three copies of the transmittal memorandum, the executed stipulation and the documents constituting the record in the case should be submitted to the Office of the Executive Secretary. In a unilateral formal settlement, the same number of copies should be submitted to the Division of Advice.

The correct address for each party, as well as the facsimile number and E-mail address, should be included in the submission. The document(s) comprising the formal settlement must contain at least one original signature for each necessary party. In addition, the formal settlement should be transmitted electronically to the Executive Secretary or Advice, as appropriate.

10164.9 Nonapproval by Board

If the formal settlement is not approved by the Board, the case will resume its status as before the execution. In this connection, the Regional Office may wish to

attempt to renegotiate the terms of the stipulation and resubmit it to the Board. If this is not possible, the case should be scheduled for hearing.

10166 Content of a Formal Settlement Stipulation

10166.1 Disposition of Allegations

A formal settlement provides for the disposition of all allegations of the complaint. Therefore, the complaint and settlement should conform. Thus, all allegations not covered by the formal settlement must be disposed of by amendment, withdrawal, or dismissal of those portions of the complaint. Such actions should be included in the stipulated record. Alternatively, the formal settlement itself may provide for withdrawal of appropriate allegations from the complaint. In consolidated cases, the settlement may provide for severance of cases, if the circumstances so require.

10166.2 Facts

Under Section 10(c), a Board order must be based on the preponderance of the testimony. Therefore, either in the pleadings or the formal settlement stipulation, the facts of the unfair labor practice involved must be clearly set forth. Allegations in the complaint, either undenied or expressly admitted, may satisfy this requirement; otherwise, the facts must expressly be set forth in the stipulation itself. Where there is some question as to the clarity of the material facts as they appear in the pleadings, all doubts should be resolved in favor of insisting that they be inserted in the formal settlement stipulation. If the stipulation does not provide for the entry of a court judgment, particular care should be taken to set forth all relevant facts to ensure enforcement.

Certain facts critical to establishing the propriety of the Board's order and subsequent court enforcement should be set forth in a formal settlement stipulation, whether or not they are contained in the pleadings. Examples of such necessary facts which should be contained in the stipulation are set forth in Secs. 10166.3–10166.8

10166.3 Overall Content of Formal Settlement Stipulation

(a) *Caption/Parties/Signatures:* The stipulation caption should include the correct full name of all:

- Respondents, including the names of all partners and sole proprietorships, where appropriate
- Charging Parties
- Intervenors
- Parties in Interest

If the case involves the disestablishment, withdrawal of recognition from, or voiding of all or any part of an agreement with a labor organization, that organization

should be a party to the stipulation or it should file a waiver of any right to participate or an affidavit certifying that it is dissolved and does not claim to represent the employees concerned. Such waiver or affidavit should be made part of record. Secs. 10134.3 and 10166.3(c).

The stipulation signature lines should name the correct entities.

(b) *General Recitals*: The stipulation should contain a recital of:

- The essential commerce facts necessary to establish Board jurisdiction. Sec. 10168, Pattern 60 at II. An admission that the Board has jurisdiction is not enough.
- A waiver of formal hearing and further proceedings. Sec. 10168, Pattern 60 at IV (3).
- An enumeration of the documents and pleadings that constitute the entire record. Secs. 10166.3(c) and 10168, Pattern 60 at IV (5).
- The procedural facts including filing of charges; issuance of complaints and notices of hearing; orders of severance, dismissal and withdrawal; and service on parties. Secs. 10166.3(c) and 10168, Pattern 60 at IV (1), (2) and (5).
- A statement that the union is a labor organization within the meaning of Section 2(5) of the Act. Sec. 10168, Pattern 60 at III.
- Other essential facts not apparent from the pleadings, but necessary to establish the unfair labor practices. Sec. 10166.2.
- An express consent to entry of a Board order in conformity with the stipulation without further notice. Secs. 10166.7 and 10168, Pattern 60 at VI, and, where appropriate, consent to entry of a court judgment and waiver of all defenses to entry and notice of filing of the application for enforcement. Secs. 10166.8 and 10168, Pattern 60 at VII. Entry of a court judgment is preferred, and makes unnecessary an admission that the respondent committed unfair labor practices and a recitation of facts establishing the unfair labor practices. Secs. 10164.5 and 10166.8.
- Unless court enforcement is provided for, an admission that respondent committed the unfair labor practices alleged in the complaint. Secs. 10164.5 and 10168, Pattern 60 at IV (4).
- A statement that the entire agreement between the parties is contained in the stipulation. Sec. 10168, Pattern 60 at IV (6).
- A statement that the settlement is subject to and effective upon the approval of the Board. Sec. 10168, Pattern 60 at IV (8).

(c) *Documents Constituting the Record*: The following documents as set forth in Sec. 10168, Pattern 60 at IV (5) constitute the record in a formal settlement:

- The formal settlement stipulation
- The charge(s) and amended charge(s)
- The original/amended/consolidated complaint and notice of hearing and affidavits of service if the facts of service have not been set forth in the stipulation
- Regional Director orders withdrawing/dismissing allegations
- Affidavits of service of all necessary documents if the facts of service have not been set forth in the stipulation
- The answer, but only if the respondent insists and it has not been withdrawn. Preferably the answer should be withdrawn. Sec. 10164.4.
- The order of severance, if consolidated complaint had issued and severance occurred, and
- Any letter, document or affidavit disposing of the rights of other interested parties. Sec. 10134.3.

Hearing transcripts should not be incorporated as part of the record.

10166.4 Other Case Specific Issues

Case specific issues common in formal settlements are addressed below.

(a) *Nonadmission Clauses:* Nonadmission clauses may not be included if the stipulation does not provide for a court judgment. Secs. 10164.5 and 10168, Pattern 60 at IV(6). Nonadmission clauses should not be included in notices. Sec. 10130.8.

(b) *Scope of the Stipulation and Reservation of Evidence:* The stipulation should contain a clause stating that the stipulation does not constitute a settlement of any other cases or matters and should also contain a reservation of evidence clause. Sec. 10168, Pattern 60 at IV (7).

(c) *Consolidated C & R Cases*: In a consolidated C and R case, the stipulation should make provision for resolution of the R case. *Aero Corp.*, 237 NLRB 455 (1978).

(d) *Joint & Several Liability*: If joint and several respondents are parties and the apportionment of backpay is not equal, the apportionment should be specified. If one respondent is willing to settle but the other is not, the stipulation should provide that the signing respondent will bear only its proportionate share of the backpay liability unless efforts to obtain payment of the remaining portion from the other respondent should fail. Secs. 10130.5 and 10130.6.

(e) *Bargaining Order Cases:* When a bargaining order is provided for, a description of the bargaining unit and a statement that the union represents a majority of the employees therein should be set forth. Secs. 10166.3(b), 10166.5(b) and 10168, Pattern 60 at V.

10166.5 Proposed Order Provisions

Certain specific issues relative to order provisions of formal settlement stipulations are addressed below.

(a) *Organization & Language*: The proposed order provisions of the stipulation should:

- Set forth the cease and desist provisions and thereafter the affirmative provisions of the proposed order. Sec. 10168, Pattern 60 at VI (1) and (2).
- In the affirmative provisions of the proposed order, follow the time deadlines established by the Board in *Indian Hills Care Center*, 321 NLRB 144 (1996). Sec. 10168, Pattern 60 at VI (2).
- Contain a 21-day sworn certification-of-compliance provision. Secs. 10168, Pattern 60 at VI 2(j) and 10170 at VI 2(g) and also see *Indian Hills Care Center*, supra.
- Provide for either narrow or broad order language, as appropriate. Sec. 10168, Pattern 60 at VI (1)(b).
- Use the proper language for respondent employers ("officers, agents, successors and assigns") and respondent unions ("officers, agents and representatives"). Secs. 10168, Pattern 60 at VI and 10170 at VI.

(b) *Bargaining Order*: If the stipulation intends to impose a bargaining obligation, the proposed order as set forth in Sec. 10168, Pattern 60 at VI (2)(h) should provide for:

- Affirmative bargaining obligation language
- A requirement that any agreement reached be reduced to writing
- A description of the bargaining unit, and
- An accurate statement of the union's full name.

If the unlawful refusal to bargain occurred during the certification year, the proposed order should provide for an extension of the certification year. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Sec. 10168, Pattern 60 at VI (2)(h).

(c) *Information Cases*: If the stipulation intends to require the respondent to provide information to the union, the proposed order should specify the precise information to be provided. The proposed order should require the respondent to provide the union with the information that it requested without the necessity of making a new request. *I & F Corp.*, 322 NLRB 1037 fn. 1 (1997).

(d) *Unilateral Changes*: If the case involves an unlawful unilateral change, the proposed order should require the respondent to rescind the change and make the employees whole for their losses. However, to the extent that the unlawful unilateral

change may have benefited unit employees, the proposed order should contain language to the effect that it shall not be construed as requiring or authorizing the respondent to rescind those benefits unless requested to do so by the union. See, e.g., *Wanex Electrical Services*, 338 NLRB No. 16, slip op. at 3, 4 (2002).

(e) *Minority Union*: In cases where the employer has unlawfully entered into a collective-bargaining agreement with a minority union, the proposed order should require the employer to cease giving effect to the contract but provide that nothing in the order "shall require the withdrawal or elimination of any wage increase or other benefits or terms and conditions of employment that may have been established pursuant to the performance of the contract." *Alliant Foodservice,* 335 NLRB No. 57, slip op. at 3 (2001).

(f) *Backpay*: The proposed order should liquidate the backpay owed. Sec. 10164.6. The exact amount of backpay owed should be set forth in the proposed order and in the notice opposite each discriminatee's name and the figure totaling the full amount of backpay owed should be set forth in the proposed order. Secs. 10164.6 and 10168, Pattern 60 at VI (2)(d).

Where offers of reinstatement/instatement are required, the stipulation should contain a provision that the respondent will make whole the discriminatees for any additional loss of earnings plus interest caused by its failure to offer reinstatement/instatement within 14 days of entry of the Board order. Secs. 10164.6 and 10168, Pattern 60 at VI (2)(e) and *Indian Hills Care Center*, 321 NLRB 144 (1996). If such a provision is used, the proposed order should require the production of backpay records. Secs. 10164.6 and 10168, Pattern 60 at VI (2)(g).

If the respondent is to provide records for the calculation of backpay, the proposed order should contain the standard Board language for record production (*Ferguson Electric Co., Inc.*, 335 NLRB No. 15 (2001) ("Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order")). Sec. 10168, Pattern 60 at VI (2)(g).

If the interest owed by the respondent has not been calculated but interest is to be paid on backpay (*New Horizons for the Retarded,* 283 NLRB 1173 (1987)), or losses to benefit funds are to be paid (*Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979)), the method of computing those payments should be specified.

(g) *Installment Payments*: If the settlement provides for installment payments, the stipulation should state that upon approval by the Board it is effective nunc pro tunc to the date of execution of the stipulation, or, in the alternative, it may provide for payments only after Board approval. Sec. 10168, Pattern 60 at VI (2)(e) and (f) and OM-98-67.

Security documents such as a personal guarantee, third party guarantee, assignment of contract proceeds, real property mortgage, real property deed of trust,

surety bond and security agreement, when required, should be included as part of the settlement stipulation as attachments.

(h) Reinstatement/Expungement: Where offers of reinstatement/instatement are to be required, the name of each discriminatee entitled to reinstatement/instatement should be included in the proposed order and notice. Sec. 10168, Pattern 60 at VI (2)(b).

If the discriminatee is to be reinstated to a position different than his former position, that position should be specified. Sec. 10130.3.

In circumstances where the discriminatee has chosen to forgo reinstatement/instatement, the proposed order and notice should provide that the discriminatee does not desire reinstatement/instatement or that such an offer has been refused. Secs. 10130.4 and 10130.9.

The proposed order should provide for expungement of records and written confirmation of expungement in cases of unlawful discipline or discharge. Sec. 10168, Pattern 60 at VI (2)(c) and also see *Indian Hills Care Center*, 321 NLRB 144, 145 (1996) ("Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.").

(i) *Hiring Halls*: In circumstances where there is an exclusive hiring hall, the proposed order should provide that the discriminatees be given credit in the seniority formula for the number of hours of employment discriminatorily denied them. Sec. 10130.10.

(j) *Specific Orders*: For specific order provisions in CA cases consult Sec. 10168, and in CB, CC and CD cases consult Sec. 10170.

10166.6 Proposed Notice and Related Order Provisions

Certain specific issues relative to notices proposed in formal settlement stipulations are addressed below.

(a) *Notice Content*: The notice should:

- Be directed to the appropriate group and on the appropriate notice form ("Employees" or "Employees and Members"). Sec. 10132.2.
- Mirror the provisions of the proposed order
- Conform to those normally issued by the Board in contested cases
- Be written in clear layperson's language, *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001)
- Set forth a statement of rights under Section 7 of the Act, a statement describing the function of the Board and its processes, and the contact information for the Regional Office and the Board website, *Ishikawa Gasket America, Inc.,* supra
- Set forth the appropriate language for statutory priority cases. Secs. 10202–10222.

(b) *Notice Posting/Mailing/Reading*: The proposed order should:

- Set forth any specific details concerning the posting/mailing/reading of the notice, such as any required translation; exact posting sites; method, verification and recipients of all mailing; any required newspaper publication; and any required notice reading and by whom. Sec. 10132.4.
- Provide that if respondent goes out of business or closes the involved facility, the notice should be mailed to employees employed by it at any time since the date of the first unfair labor practice. *Excel Container, Inc.*, 325 NLRB 17 (1997).
- If the settlement involves a charge against a union, require the union to submit signed copies of the notice to the Regional Director for forwarding to the employer for posting. Secs. 10132.4 and 10170 at VI (2)(f); *Electrical Workers Local 3 (M. F. Electrical Service Co.*), 325 NLRB 527 (1998).
- Specify the time period for the notice posting, which should be for 60 days unless prior clearance has been obtained from the Division of Advice. Secs. 10132.1, 10168, Pattern 60 at VI (2)(i) and 10170 at VI (2)(e).

10166.7 Consent to Board Order

Within the formal settlement stipulation, the parties must consent to the entry of a Board order without further notice. The terms of the order must be specific and, since the Board must act in conformity with the formal settlement stipulation, the language should follow the substance of Board orders in comparable cases. It is permissible, when appropriate, to substitute "shall not" for "shall cease and desist from," with corresponding grammatical changes.

10166.8 Consent to Court Judgment

The standard provision for the Consent to Court Judgment set forth at Sec. 10168, Pattern 60 at VII is self-explanatory and is applicable to all other types of unfair labor practice cases.

10168 Pattern 60, Formal Settlement Stipulation in CA Case

Although the specific content of a formal settlement stipulation will vary depending upon the circumstances present in a particular case, the following is a suggested pattern for use in formal settlements in CA cases:

ABC Company

Respondent

and

XYZ Union **Case**

Charging Party

and

Mutual Benefit Society

Intervenor

FORMAL SETTLEMENT STIPULATION

I. INTRODUCTION

Through this formal settlement stipulation, the parties to this proceeding -- ABC Company (Respondent), XYZ Union (Charging Party), Mutual Benefit Society (Intervenor) and the General Counsel of the National Labor Relations Board -- agree that, upon approval of this stipulation by the Board, a Board Order in conformity with its terms will issue [and a court judgment enforcing the Order will be entered]. The parties also agree to the following:

II. JURISDICTION

1) Respondent is a Delaware corporation with its principal office in New York, New York. It operates a plant in Columbia, Alabama (the Columbia plant), where it is engaged in the manufacture, non-retail sale and distribution of furniture.

2) In conducting its business operations at the Columbia plant during the one-year period ending June 30, 20_, Respondent purchased and received goods valued in excess of $50,000 directly from outside the State of Alabama.

3) Respondent is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. LABOR ORGANIZATION STATUS

The Charging Party and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

IV. PROCEDURE

1) FILING AND RECEIPT OF CHARGE(S). On June 1, 20_, the Charging Party filed a charge in Case _____, which was served on Respondent on June 1, 20_. On June 8, 20__, the Charging Party filed an amended charge in Case _____, which was served on Respondent on June 8, 20_. On June 15, 20__, the Charging Party filed a second amended charge in Case _____, which was served on Respondent on June 15, 20_. Respondent acknowledges receipt of the charge, amended charge and second amended charge.

2) ISSUANCE OF COMPLAINT. On ____(date)_____, the Regional Director for Region ___ of the Board issued a Complaint and Notice of Hearing in Case _____, alleging that

Respondent violated the National Labor Relations Act. Respondent, the Intervenor and the Charging Party each acknowledge receipt of a copy of the Complaint and Notice of Hearing, which was served by certified mail on June 18, 20_.

[Note: Where an answer to the complaint(s) has been filed, an additional numbered paragraph with the following language should be used to withdraw the answer. Sec. 10164.4.**]** **By entering into this stipulation, the parties agree that the Answer to the Complaint filed by Respondent on or about _____ is withdrawn.**

3) **WAIVER. All parties waive the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which the parties may be entitled under the Act or the Board's Rules and Regulations.**

4) **ADMISSION. [**Note: This paragraph is necessary where there is no provision for entry of a court judgment. Sec. 10164.5.**]** **Respondent admits the allegations contained in paragraphs __ of the complaint.**

5) **THE RECORD. The entire record in this matter consists of the following documents: this stipulation; the charge; amended charge; second amended charge; and Complaint and Notice of Hearing. Copies of the charge, amended charge, second amended charge and Complaint and Notice of Hearing are attached as Exhibits ___ through ___. [**Note: Affidavits of service of the charge, amended charge, second amended charge and complaint and notice of hearing should be included if the service of these documents and their receipt by the parties have not been set forth in the stipulation. The answer should be included, if respondent or intervenor insists. See Sec. 10166.3(c)**].**

6) **ENTIRE AGREEMENT. This stipulation constitutes the entire agreement between the parties and there is no agreement of any kind, verbal or otherwise, that alters or adds to it. [**The following may be added only in stipulations providing for court judgment. Sec. 10130.8. **It is understood that the signing of this**

stipulation by Respondent does not constitute an admission that it has violated the Act.]

7) **SCOPE OF THE STIPULATION AND RESERVATION OF EVIDENCE. This stipulation settles only the allegations in the above-captioned case(s) and does not constitute a settlement of any other cases or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this stipulation, regardless of whether those matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other cases, and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to that evidence.**

8) **EFFECTIVE DATE. This stipulation is subject to the approval of the Board and it does not become effective until the Board has approved it. The Regional Director** [or General Counsel in the case of unilateral settlements] **will file with the Board this stipulation and the documents constituting the record as described above. Once the Board has approved the stipulation, Respondent will immediately comply with the provisions of the order as set forth below.**

V. FACTS

[When appropriate. Sec. 10166.6. If a bargaining order is required, set forth a description of the appropriate bargaining unit and the labor organization's majority status in that unit.]

VI. ORDER

Based on this stipulation and the record as described above, and without any further notice of proceedings, the Board may immediately enter an order providing as follows:

Respondent, ABC Company, its officers, agents, successors and assigns, shall:

1. **Cease and desist from:**

[8(a)(1)**]**

(a) **[**NOTE: Insert language covering specific 8(a)(1) violations alleged in complaint; likewise, the notice should be patterned after the provisions of the order.**]**

(b) In any other **[**or "like or related"**]** **manner interfering with, restraining or coercing its employees in the exercise of their right to self organization, to form labor organizations, to join or assist XYZ Union or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.**

[8(a)(2)**]**

(c) Dominating or interfering with the administration of Mutual Benefit Society, or dominating or interfering with the formation or administration of any other labor organization of its employees, or from contributing financial or other support to Mutual Benefit Society or to any other labor organization of its employees.

[8(a)(2)**]**

(d) Recognizing Mutual Benefit Society as the representative of any of its employees for the purposes of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of employment.

[NOTE: If the case involves assistance only and not domination, the following paragraph should be substituted for subparagraph (c) above:**]**

"Contributing financial or other support to Mutual Benefit Society or to any other labor organization of its employees."

[and the following language should be added to subparagraph (d):**]**

"unless and until that organization has been certified by the National Labor Relations Board as the exclusive representative of those employees."]

[NOTE: If the case involves a collective-bargaining agreement between Respondent and the assisted or dominated organization, an additional provision should be added to the order, if it is appropriate, to set aside the contract. See, e.g., *Farmer's Energy Corp.,* 266 NLRB 722 (1983); *International Metal Products Co.,* 104 NLRB 1076 (1953).**]**

[8(a)(3)**]**

(e) Discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to hire or tenure of employment or any other term or condition of employment, in order to discourage membership in XYZ Union or in any other labor organization.

[8(a)(5)]

(f) Refusing to bargain collectively with XYZ Union as the exclusive representative of all its employees at the Columbia, Alabama plant, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[8(a)(2)]

(a) Withdraw all recognition from Mutual Benefit Society as representative of any of its employees for the purpose of dealing with the Respondent with respect to grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of employment, and completely disestablish Mutual Benefit Society as such representative.

[NOTE: If the case involves assistance only and not domination, the language "and completely disestablish Mutual Benefit Society as such representative" should be omitted and in its place should be added the language "unless and until the organization has been certified by the National Labor Relations Board as such representative."]

[8(a)(3)]

(b) Within 14 days from the date of the Board's Order, offer [names of employees**] full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.**

[If the agreement between the parties reflects a date certain for the reinstatement of employees, this paragraph should be amended accordingly.]

(c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the discharge of [name of employees] **and within 3 days thereafter, notify those employees, in writing, that this was done and that the discharges will not be used against them in any way.**

(d) Make whole the following employees for any loss of pay they may have suffered by reason of the [alleged] **discrimination against them, by payment to them of the amounts set opposite their respective names:**

J. Smith	**$1,350.00**
M. Brown	**2,125.00**
S. Cohen	**1,525.00**
	$5,000.00

(e) Make whole the above-named employees for any additional loss of pay caused by Respondent's failure, if any, to reinstate them in accordance with the provisions of this Order, within 14 days from the date of this Order, by payment to them of the respective amounts that they would have earned if properly reinstated, from the 15th day after the date of this Order to the date of a proper offer of reinstatement, less their net earnings during such period, said amounts to be computed on a quarterly basis.

[NOTE: The language in (e) need only be used where the reinstatement is to follow the issuance of the Board's Order Approving the stipulation. It should be modified accordingly if the parties' agreement contains a date certain for reinstatement.]

[NOTE: Installment payments - when a formal settlement stipulation provides for installment payments, the Regional Office should add the following sentence: "This

stipulation is subject to the approval of the Board and, immediately upon approval by the Board, it will be retroactively effective to the date of execution of the stipulation." Alternatively, the Regional Office can make the first installment payment due 30 days (or some other specific time period) after the Board's approval of the stipulation, with subsequent payments due every 30 days (or some other specific time period) thereafter. See also Sec. 10603 of the Compliance Manual and Appendices 9 and 10 regarding Security Agreements and default language.**]**

(f) Make whole the following employees for loss of pay suffered by reason of the discrimination against them, by payment to them of the amounts set forth opposite their respective names and at the times set forth in the schedule that follows. [If any installment is not paid on or before the date due, the full unpaid amount shall become immediately due and payable and the Board may, without further notice, institute proceedings against the Respondent for the collection of the full indebtedness remaining due, with additional interest due on the entire unpaid balance from the date of default until full payment is received, computed in accordance with the formula set forth in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).]

SCHEDULE

Names of Employees	**Amt. Due and Date of Payment**			**Total**
	8/1/20	**9/1/20**	**10/1/20**	
J. Smith	**$500.00**	**$500.00**	**$350.00**	**$1,350.00**
M. Brown	**900.00**	**900.00**	**325.00**	**2,125.00**
S. Cohen	**600.00**	**600.00**	**325.00**	**1,525.00**
Total	**$2,000.00**	**$2,000.00**	**$1,000.00**	**$5,000.00**

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good

cause, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[NOTE: This provision is unnecessary if the stipulation contains an agreed-upon amount of backpay.**]**

[8(a)(5)**]**

(h) Upon request, bargain collectively with XYZ Union as the exclusive representative of all its employees at its Columbia, Alabama plant, excluding office clerical employees, guards, professional employees and supervisors, as defined in the Act, with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, reduce it to writing and sign it.

[NOTE: When a refusal to bargain occurs during the certification year, the certification year should be extended to compensate for that period of time during which good-faith collective bargaining did not occur due to respondent's unlawful refusal to bargain. *Mar-Jac Poultry Co.,* 136 NLRB 785 (1962). In cases involving refusals to bargain during the certification year, the bargaining order should conform to this provision and specifically extend the certification year for the appropriate period of time. *Van Dorn Plastic Machinery Co.,* 300 NLRB 278 (1990); *General Electric Co.,* 163 NLRB 198 (1967). For example, a Board order may read as follows:

> On request, bargain with the Union as the exclusive representative of the employees in the Unit and if an understanding is reached, reduce it to writing and sign it. On resumption of bargaining, the Union's status as the exclusive collective-bargaining representative of the Unit shall be extended for ___ months thereafter, as if the initial year of the certification has not expired.**]**

[NOTE: In cases when there has been no bargaining during the certification year, the word "commencement" should be substituted for "resumption."**]**

[ALL CASES]

(i) Within 14 days of service by the Region, post at its Columbia, Alabama plant copies of the attached notice marked "Appendix A." [Attach to the stipulation a copy of the Notice to Employees and mark it "Appendix A." For guidance regarding notice language, see Sec. 10132.3.] **Copies of the notice, on forms provided by Region __, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Respondent will take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since** [date of the first unfair labor practice].

[NOTE: In all CA and CB cases, where the company and union as corespondents have entered into a joint settlement agreement, the settlement should provide for posting by respondent/company of the notice signed by the union respondent by inserting an additional paragraph after (i) as follows:

Post at the same places and under the same conditions, as set forth above, copies of the attached notice to employees marked "Appendix B" [Union - Notice to Employees and Members] **as soon as they are provided to Respondent by Region [__.]]**

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[NOTE: If the stipulation contains no provision for a consent judgment, there must be an admission of the allegations of the complaint or a stipulation of facts showing the commission of unfair labor practices (see par. IV,4). Such an admission or stipulation is essential to enforcement of the Board order in the Court of Appeals in the event of respondent's failure to comply. Sec. 10164.5.]

VII. ENFORCEMENT OF ORDER

The United States Court of Appeals for any appropriate circuit may, on application by the Board, enter its judgment enforcing the Order of the Board in the form set forth above. Respondent waives all defenses to the entry of the judgment, including compliance with the order of the Board and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words [and figures] set forth above. However, Respondent shall be required to comply with the affirmative provisions of the Board's Order after entry of the judgment only to the extent that it has not already done so.

ABC Company

Respondent

By

_____ _____

Joe B. Smith, President **Date**

[address]

XYZ Union

Charging Party

By

_____ _____

Sam Brown, International Representative **Date**

[address]

Mutual Benefit Society
Intervenor
By

_____ _____
President **Date**
[address**]**

Approval recommended:

_____ _____
Date

Attorney, Region _____
National Labor Relations Board
[address**]**

Approved:

_____ _____
Office of the General Counsel **[or] Regional Director,**
Region ___

National Labor Relations Board **[**address**]**
Washington, D.C. 20570

_____
Date

[NOTE: As set forth above in Sec. 10164.7, unilateral formal settlements are approved by the General Counsel and bilateral formal settlements are approved by the Regional Director.]

10170 Pattern for Settlement Stipulation in CB, CC, CD, and CE Cases

The above pattern for settlement stipulations in CA cases is generally also applicable to CB, CC, CD, CE, CG, and CP cases. The principal differences of substance between the CA stipulation pattern and the stipulation in other cases is in the Board order set forth in paragraph "VI. Order," of Pattern 60 (Sec. 10168) and in the attached notice to employees. For this reason, the entire stipulation form is not being incorporated here. However, the following drafts of cease and desist and affirmative provisions for frequently encountered CB, CC, CD, and CE circumstances are set forth below. (Since CG and CP charges are rare, no specific examples are provided; however, Regional Offices should tailor language to fit the particular circumstances.)

[NOTE: The following patterns utilize the basic statutory language. The specific provisions of a formal settlement should conform to the allegations in the complaint.]

VI. ORDER

Based on this stipulation and the record as described above, and without any further notice of proceedings, the Board may immediately enter an order providing as follows:

Respondent, XYZ Union, its officers, agents and representatives, shall:

1. Cease and desist from:

[8(b)(1)(A)]

(a) Restraining or coercing employees of ABC Company [or any other employer**] in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, by _____.**

[8(b)(1)(B)]

(b) Restraining or coercing ABC Company [or any other employer] **in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances, by _____.**

[8(b)(2)]

(c) Causing or attempting to cause ABC Company [or any other employer] **to discriminate against any employees in regard to their hire or tenure of employment, or any term or condition of employment, in violation of Section 8(a)(3) of the Act, as amended, by _____.**

[8(b)(2) or (3)]

(d) Giving effect to paragraph(s) _____ of its contract with ABC Company.

[8(b)(3)]

(e) Refusing to bargain collectively with ABC Company on behalf of all employees of its Columbia, Alabama plant, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

[8(b)(4)(i) and (ii)(A)—Conduct Compelling Union Membership]

(f) Engaging in, or inducing or encouraging any individual employed by ABC Company, or any other person engaged in commerce or in an industry affecting commerce, to

engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining the ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to join [Charged Union] or any other labor organization.

[8(b)(4)(i) and (ii)(A)—Conduct Compelling Membership in Employer Organization]

(g) Engaging in, or inducing or encouraging any individual employed by ABC Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining the ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to join [Employer Organization**] or any other employer organization.**

[8(b)(4)(i) and (ii)(A)—Conduct Seeking an 8(e) Agreement]

(h) Engaging in, or inducing or encouraging any individual employed by ABC Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing

or requiring ABC Company to enter into, maintain, give effect to, or enforce an agreement whereby ABC Company agrees to cease doing business with any other person.

[8(e)—Hot Cargo Agreement]

(i) Maintaining, giving effect to, or enforcing its agreement with [Union or Employer**], entered into on [**Date**], insofar as it provides: [**Set Forth Clause**]; or to any extension, renewal, modification, or supplement thereof, or to enter into any other agreement with [**Employer or Union**], or any other [**labor organization or employer as appropriate**], whereby the signatory employer cease(s) or refrain(s) or agree(s) to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any employer, or to cease doing business with any other person.**

[8(b)(4)(i) and (ii)(B)—Secondary Conduct with Cease Doing Business Objective]

(j) Engaging in, or inducing or encouraging any individual employed by D Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining D Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require D Company, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with ABC Company or any other person.

[8(b)(4)(i) and (ii)(B)—Secondary Conduct with Recognitional Objective]

(k) Engaging in, or inducting or encouraging any individual employed by D Company, or any other person engaged in commerce or in an industry affecting commerce except ABC Company, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or threatening, coercing, or restraining D Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to recognize or bargain with XYZ Union, or any other labor organization, as representative of any of the employees of ABC Company, unless and until such labor organization has been certified by the National Labor Relations Board as the representative of such employees.

[8(b)(4)(i) and (ii)(C)—Primary Conduct With Recognitional Objective Where Another Union Certified]

(l) Engaging in, or inducing or encouraging any individual employed by ABC Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to recognize or bargain with XYZ Union, or any other labor organization, as the representative of any employees of ABC Company in a bargaining unit covered by a certification issued on [Date], in Case [Number] to an organization other than XYZ Union.

[8(b)(4)(i) and (ii)(D)—Jurisdictional Disputes]

(m) Engaging in, or inducing or encouraging any individual employed by ABC Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to assign the work of [Describe the Work in Dispute] **to employees who are members of, or represented by XYZ Union rather than to employees who are not members of, or represented by, XYZ Union.**

[8(b)(5)—Excessive Fees]

(n) Requiring of employees covered by an agreement authorized under Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959, the payment as a condition precedent to becoming members of XYZ Union of a fee in an amount that is excessive or discriminatory.

[8(b)(6)—Featherbedding]

(o) Causing or attempting to cause ABC Company to pay or deliver, or to agree to pay or deliver, any money or other thing of value in the nature of an exaction for services that are not performed or not to be performed.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[8(b)(2)]

(a) Notify ABC Company, in writing, that it has withdrawn its objections to the said Company's employment of Joe Doaks and now requests the Company to reinstate Joe Doaks. Notify Joe Doaks, in writing, that it has so informed ABC Company.

(b) Make whole Joe Doaks for any loss of pay suffered by reason of the [alleged] discrimination against him by payment to him of the amount of $_____.

(c) Make whole Joe Doaks for any additional loss of pay caused by the failure of the Respondent, within 14 days from the date of this Order, (1) to notify ABC Company in writing that it has withdrawn its objections to said Company's employment of the said Joe Doaks and requests the Company to reinstate him or (2) to notify Joe Doaks, in writing, that it has so informed ABC Company; by payment to the said Joe Doaks of the amount that he would have earned if reinstated by ABC Company, from the 15th day after the date of this Order to the date of the giving of the said notices by the Respondent to ABC Company and to the said Joe Doaks, less his net earnings during such period, said amounts to be computed on a quarterly basis.

[NOTE: If the Union has withdrawn its objection and/or the discriminatee has been reinstated or paid, the language should be modified accordingly. In addition, the language should also be modified to reflect the Union's continuing backpay obligation if it is anticipated the Employer will not reinstate the discriminatee upon the Union's request.]

[8(b)(3)]

(d) Bargain collectively, upon request, with ABC Company in regard to rates of pay, wages, hours of employment or other terms and conditions of employment of all employees at the Columbia, Alabama plant of said Company, excluding office clerical employees, guards, professional employees and supervisors, as defined in the Act.

[ALL CASES]

(e) Within 14 days of service by the Region, post at its business office in Columbia, Alabama copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region ___, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced or covered by any other material.

(f) Mail to the Regional Director for Region __ signed copies of the said notice for posting, if ABC Company is willing, in the plant of ABC Company at Columbia, Alabama, in the places where notices to employees are customarily posted. Copies of said notice, on forms provided by Regional Director for Region __, after having been signed by Respondent's representative, shall be forthwith returned to the Regional Director for such posting by ABC Company.

[NOTE: In all CA and CB cases, where the company and union as co-respondents have entered into a joint settlement agreement, delete the words "if ABC Company is willing," in par. (f), above.**]**

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.